

APPEAL NO. 030519
FILED APRIL 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 22, 2003. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____, and that the claimant has not had disability as a result of any injury sustained on _____. The claimant appealed the injury and disability determinations. The respondent/cross-appellant (carrier) appeals a finding of fact regarding the time period the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage due to the claimed injury.

DECISION

Reversed and remanded.

The disputed issues from the benefit review conference report and as agreed to by the parties at the CCH were: (1) Did the claimant sustain a compensable injury on _____? and (2) Did the claimant have disability resulting from an injury sustained on _____, and if so, for what period?

At the CCH, the claimant contended that he sustained a repetitive trauma injury to his knees over the course of several months from turning and twisting while pushing a cart at work and from lifting at work. The claimant did not contend that he sustained a specific-event injury at work on _____. The claimant made it clear in his answers to the hearing officer's questions that he was claiming a repetitive trauma injury. The _____, date was a date the claimant said he knew his injury was work related and reported the injury to his employer. However, the claimant also testified about reporting his knee problems as work related to his employer in July and September 2001.

The hearing officer states in his decision:

Claimant failed to prove he sustained a compensable injury on _____. He did not sustain a single event injury. He may have sustained a compensable repetitive trauma injury, and if so the date of injury would be in July of 2001, when as he stated he first thought his knee problems may have been work related, or certainly by September of 2001, when, he testified on cross examination, he told the Employer he thought his knee problems were work related.

The hearing officer made the following findings of fact and conclusions of law:

FINDING OF FACTS

3. Claimant was not injured in the course and scope of his employment on _____.
4. Due to the claimed injury Claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage for the period beginning on December 27, 2001 and continuing through January 11, 2002 and for the period beginning on January 13, 2002 and continuing through the date of this hearing.

CONCLUSIONS OF LAW

2. Claimant did not sustain a compensable injury on _____.
3. Claimant did not have disability as a result of any injury sustained on _____.

Section 401.011(10) defines a “compensable injury” as “an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.” The definition of “injury” in Section 401.011(26) includes an occupational disease, and the definition of “occupational disease” in Section 401.011(34) includes a repetitive trauma injury, which is defined in Section 401.011(36) as “damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment.” A “compensable injury” includes a compensable repetitive trauma injury.

We conclude that the hearing officer erred in not making a determination on the claimant’s theory of how he sustained a compensable injury, that is, the claimant contended that he sustained a repetitive trauma injury. The hearing officer made no findings of fact with regard to whether the claimant sustained a repetitive trauma injury. The hearing officer’s decision reflects that he only found that the claimant did not sustain a “single event injury.” The claimant did not claim a single-event or specific injury. With regard to the claimant’s contention that he sustained a repetitive trauma injury, the hearing officer states in his decision that the claimant “may” have sustained a compensable repetitive trauma injury.

The fact that the claimant was claiming a repetitive trauma injury at the CCH is consistent with his Employee’s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), dated April 12, 2002, in which the claimant claimed that the injury to his knees occurred by “doing the same movement with knees.” The claimant’s claim of a repetitive trauma injury is also consistent with his treating doctor’s report of February 15, 2002, which includes a description of the claimant’s work activities as related to the doctor by the claimant.

In Texas Workers' Compensation Commission Appeal No. 000741, decided May 25, 2000, we stated that "We have previously affirmed cases in which the hearing officer found a compensable single-event injury although the issue was framed in terms of occupational disease. Texas Workers' Compensation Commission Appeal No. 992851, decided January 27, 2000; Texas Workers' Compensation Commission Appeal No. 992343, decided December 6, 1999." We note that in Texas Workers' Compensation Commission Appeal No. 012812, decided December 19, 2001, an issue of occupational disease was not litigated and thus the Appeals Panel affirmed the hearing officer's determination that the claimant had not sustained a compensable specific injury.

In the instant case, the issue was framed as to whether the claimant sustained a compensable injury on _____; however, the claimant contended that his injury occurred over time from repetitive trauma to his knees, and a repetitive trauma injury was actually litigated, not a specific injury.

We conclude that the hearing officer erred in failing to make findings of fact and a determination on whether the claimant sustained a compensable injury as the result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment, and we remand the case to the hearing officer to make such findings and a determination on whether the claimant sustained a repetitive trauma injury.

The date of injury for an occupational disease, which includes a repetitive trauma injury, is the date on which the employee knew or should have known that the disease may be related to the employment. Section 408.007. The Appeals Panel has stated that "the date of an occupational disease ultimately presents a question of fact for the hearing officer to decide, and a hearing officer may find a date of injury different from that alleged if the evidence indicates otherwise." In Texas Workers' Compensation Commission Appeal No. 012707, decided December 20, 2001, the Appeals Panel noted that "a repetitive trauma injury by definition does not occur at a specific or particular time," and that "if a repetitive trauma injury is shown to have occurred in the course and scope of employment, the fact that the evidence indicates an earlier injury date would not in and of itself defeat an otherwise valid claim." On remand, the hearing officer should determine the date of the claimed repetitive trauma injury under Section 408.007.

With regard to the carrier's appeal of Finding of Fact No. 4, the reports of the claimant's treating doctor sufficiently support that finding. However, since the hearing officer determined that the claimant did not have disability based on his determination that there was no "single-event" injury on _____, and since we are remanding the case for the hearing officer to make a determination on the claim alleged by the claimant, a repetitive trauma injury, on remand the hearing officer should also make a determination on the disability issue.

We reverse the hearing officer's decision that the claimant did not sustain a compensable injury on _____, and that the claimant has not had disability,

and we remand the case to the hearing officer to make a determination on the claimant's claim of a repetitive trauma injury; to determine a date of injury of the claimed repetitive trauma injury under Section 408.007; and to determine the disability issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Gary L. Kilgore
Appeals Judge